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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REAL PARTY(S) IN) Case No. CV 09-08810 DDP (CTx)
INTEREST(S): PATRICIA)
ULTRERAS,) **ORDER GRANTING DEFENDANTS' MOTION**
Plaintiff,) **TO DISMISS**
v.) [Motion filed on January 19,
RECON TRUST COMPANY; AND/OR) 2010]
MERS; AND/OR COUNTRYWIDE)
HOME LOANS, INC.; AND/OR)
BANK OF AMERICA, N.A.; AND/OR)
ANY KNOWN OR UNKNOWN JOHN)
DOES, AND/OR REAL PARTY(S))
IN INTEREST,)
Defendants.)
_____)

This matter comes before the Court on a Motion to Dismiss
filed by the defendants ReconTrust Company, N.A. (erroneously sued
as "Recon Trust Company"); Mortgage Electronic Registration
Systems, Inc. ("MERS"); Countrywide Home Loans, Inc.; and Bank of
America, N.A. (collectively "Defendants"). After reviewing the
papers submitted by the parties and considering the arguments
raised therein, the Court GRANTS the motion and adopts the
following Order.

1 I. BACKGROUND¹

2 The plaintiff Patricia Ultreras ("Plaintiff"), appearing pro
 3 se, filed this suit alleging various causes of action arising from
 4 a residential mortgage transaction. The gravamen of Plaintiff's
 5 Complaint is that Defendants cannot foreclose for three basic
 6 reasons: (1) they did not provide certain disclosures when
 7 providing her loan; (2) they did not produce the original note; and
 8 (3) they securitized the debt.

9 On September 25, 2006, Plaintiff purchased property at 138
 10 South Bryn Mawr Street, #13, in Ventura, California, by executing a
 11 Deed of Trust for \$271,920.00. (Def.'s Ex. A.) On the Deed of
 12 Trust, Countrywide was listed as the lender, ReconTrust as the
 13 trustee, and MERS as the beneficiary. (Compl. ¶¶ 26-27; Def.'s Ex.
 14 A.)

15 A Notice of Default was recorded against Plaintiff's property
 16 on February 20, 2009. (Def.'s Ex. B.) A Notice of Trustee's Sale
 17 was recorded on May 27, 2009, setting the sale date for June 12,
 18 2009. (Def.'s Ex. C.) Plaintiff alleges that she "rescinded said
 19 contract" on June 17, 2009, by mailing a "Notice of Right to

20
 21 ¹Defendants request that the Court take judicial notice of the
 22 Deed of Trust, (Def.'s Ex. A), the Notice of Default, (Def.'s Ex.
 23 B), and the Notice of Trustee's Sale, (Def.'s Ex. C).

24 Although, generally, the Court may not consider materials
 25 outside of the complaint when ruling on a motion to dismiss, it may
 26 do so if the complaint references the materials and their
 27 authenticity is not disputed. See Branch v. Tunnell, 14 F.3d 449,
 454 (9th Cir. 1994), overruled on other grounds by Galbraith v.
County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) (on a motion
 to dismiss, courts may properly review "documents whose contents
 are alleged in the complaint and whose authenticity no party
 questions, but which are not physically attached to the plaintiff's
 pleading").

28 The Court grants Defendants' request for judicial notice
 pursuant to Branch, 14 F.3d at 454.

1 Cancel," a "Notice of Removal," and a "Notice of Revocation of
2 Power of Attorney" to Defendants. (Compl. ¶ 31.)

3 Plaintiff asserts six causes of action against Defendants,
4 respectively entitled (1) injunctive relief; (2) Unfair Debt
5 Collection Practices & Predatory Lending Including TILA and RESPA
6 Violations; (3) Failure to Be the Real Party in Interest in a
7 Foreclosure Action; (4) Failure to be the Holder in Due Course of
8 the Original Note and Mortgage in a Foreclosure Action; (5) Illegal
9 Securitization of the Note; and (6) Ultra Vires.

10 Defendants moved to dismiss the Complaint on January 19, 2010.
11 Plaintiff filed an opposition one day past the deadline, on
12 February 9, 2010. In the interests of resolving Defendant's motion
13 on the merits, the Court will nonetheless consider Plaintiff's
14 opposition.

15 **II. PROCEDURAL STANDARD: RULE 12(b)(6)**

16 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a
17 complaint is subject to dismissal when the Plaintiff's allegations
18 fail to state a claim upon which relief can be granted. When
19 considering a 12(b)(6) motion to dismiss for failure to state a
20 claim, "all allegations of material fact are accepted as true and
21 should be construed in the light most favorable to [the]
22 plaintiff." Resnick v. Hayes, 213 F.3d 433, 447 (9th Cir. 2000).

23 In Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), the
24 Supreme Court explained that a court considering a 12(b)(6) motion
25 should first "identify[] pleadings that, because they are no more
26 than conclusions, are not entitled to the assumption of truth."
27 Id. Next, the court should identify the complaint's "well-pleaded
28 factual allegations, . . . assume their veracity and then determine

1 whether they plausibly give rise to an entitlement to relief."

2 *Id.*; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th
3 Cir. 2009) ("In sum, for a complaint to survive a motion to
4 dismiss, the non-conclusory factual content, and reasonable
5 inferences from that content, must be plausibly suggestive of a
6 claim entitling the plaintiff to relief" (internal quotation marks
7 omitted)).

8 Where, as here, a plaintiff brings her action pro se, the
9 Court applies the motion to dismiss standard against the backdrop
10 of the general rule that courts liberally construe the pleadings of
11 pro se litigants. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

12 III. DISCUSSION

13 A. First Claim for Injunctive Relief Fails

14 Plaintiff's first claim for injunctive relief is premised on
15 her assertion that non-judicial foreclosure "is illegal and
16 violates both state and federal law." (Compl. ¶ 2.)

17 Contrary to Plaintiff's argument, California law expressly
18 permits non-judicial foreclosure. See Cal. Civ. Code §§ 2924 et
19 seq. Indeed, the foreclosure process may be conducted by the
20 "trustee, mortgagee or beneficiary or any of their authorized
21 agents." *Id.* § 2924(a)(1). The beneficiary under a Deed of Trust,
22 or its authorized agent is entitled to record the Notice of Default
23 in order to initiate non-judicial foreclosure proceedings. *Id.*
24 The trustee has the authority to "initiate nonjudicial foreclosure
25 on the property upon the trustor's default, resulting in a sale of
26 the property." Kachlon v. Markowitz, 168 Cal. App. 4th 316, 334
27 (2008). Plaintiff has pointed to no authority suggesting that this
28

1 type of non-judicial foreclosure, permissible under California law,
2 is nonetheless barred by federal law.

3 Therefore, Plaintiff's claim for injunctive relief on the
4 basis that non-judicial foreclosure is illegal fails as a matter of
5 law and is dismissed with prejudice.

6 **B. Second Claim for Unfair Debt Collection Practices, TILA,
7 and RESPA Violations Fails**

8 Plaintiff's second cause of action asserts that Defendants
9 violated California's Rosenthal Fair Debt Collection Practices Act
10 ("RFDCPA"), the Federal Fair Debt Collection Practices Act
11 ("FDCPA"), the Real Estate Settlement Procedures Act ("RESPA"), and
12 the Truth in Lending Act ("TILA"). (Compl. ¶¶ 7-18.)

13 **1. The RFDCPA and FDCPA Do Not Apply to Foreclosures**

14 The FDCPA and the RFDCPA were enacted in order to prohibit
15 debt collectors from engaging in unfair or deceptive acts or
16 practices in the collection of consumer debts. 15 U.S.C. § 1692 et
17 seq.; Cal. Civ. Code § 1788.1(b).

18 However, foreclosing on a property under a deed of trust is
19 not the collection of a debt within the meaning of either statute.
20 See Izenberg v. ETS Servs., LLC, 589 F. Supp. 2d 1193, 1199 (C.D.
21 Cal. 2008); see also Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp. 2d
22 1188, 1204 (D. Or. 2002).

23 Therefore, these claims are dismissed with prejudice.

24 **2. Plaintiff's RESPA Allegations Fail to State a Claim**

25 Plaintiff badly asserts that Defendants violated RESPA, 12
26 U.S.C. §§ 2601-17, by "plac[ing] loans for the purpose of
27 unlawfully increasing and otherwise obtaining yield spread fees,

1 excess charges and amounts in excess of what would have been
2 lawfully earned." (Compl. ¶ 15.)

3 Yield spread premiums are not per se illegal under RESPA.
4 See, e.g., Bjustram v. Trust One Mort. Corp., 322 F.3d 1201, 1208
5 (9th Cir. 2003). Rather, RESPA "requires a loan-specific analysis
6 of whether total mortgage broker compensation from all sources is
7 reasonable." Id. However, Plaintiff has failed to plead any facts
8 demonstrating why the yield spread premiums in this case were
9 allegedly illegal.

10 Plaintiff also claims Defendants violated RESPA because they
11 "transferred or hypothecated without required notice" servicing of
12 the loan. (Compl. ¶ 16.) However, Plaintiff waived prior notice
13 of any loan assignment. (Def.'s Ex. A, ¶ 20.) Furthermore,
14 Plaintiff pleads no facts in support of her argument that
15 Defendant's actions in transferring the servicing of her loan
16 violated RESPA.

17 Plaintiff has therefore failed to state a claim for RESPA
18 violations.

19 3. Plaintiff's TILA Claim Fails

20 Plaintiff asserts that Defendants violated TILA by (1) failing
21 to make a full accounting and required disclosures; (2) improperly
22 retaining funds belonging to Plaintiff; and (3) not disclosing the
23 status of the ownership of the loan. (Compl. ¶ 13.) In addition
24 to damages, Plaintiff seeks rescission under TILA because she has
25 "exercised his [sic] Rights of Rescission" in 2009. (Id. ¶ 14.)
26 However, Plaintiff's damages and rescission claims under TILA are
27 both time-barred.

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1 TILA provides that an "action [for damages] . . . may be
2 brought in any United States district court, or in any other court
3 of competent jurisdiction, within one year from the date of the
4 occurrence of the violation." 15 U.S.C. § 1640(e). The Ninth
5 Circuit has held that the one-year window for filing a TILA damages
6 claim generally "runs from the date of the consummation of the
7 transaction." King v. California, 784 F.2d 910, 915 (9th Cir.
8 1986). Here, the Court can discern from the face of Plaintiff's
9 Complaint that TILA's one-year statute of limitations has run.
10 Plaintiff obtained the mortgage loan at issue in September 2006,
11 but did not file suit until December 2009. Plaintiff has pleaded
12 no basis for equitable tolling or equitable estoppel that would
13 justify suspending the limitations period.

14 With respect to Plaintiff's rescission claim under TILA, TILA
15 requires that loan documents state the last date on which a
16 borrower may rescind the loan agreement without penalty. See 15
17 U.S.C. § 1635(a). If the lender omits the expiration date, and
18 fails to cure that omission, the time within which the borrower may
19 rescind the loan is extended from three days to three years. See
20 id. § 1635(f). Plaintiff has made vague allegations that
21 Defendants failed to make "required disclosures," but has not
22 alleged that Defendants failed to notify her of the last date
23 within which she could rescind the loan without penalty. Thus, it
24 appears her rescission claim is time-barred.

25 Even assuming that Plaintiff was entitled to rescind within
26 three years of the date the loan was consummated, her claim still
27 fails because she has not alleged her ability to tender. The TILA
28 section titled "Return of money or property following rescission"

1 provides that "[u]pon the performance of the creditor's obligations
 2 under this section, the obligor shall tender the property to the
 3 creditor, except that if return of the property in kind would be
 4 impracticable or inequitable, the obligor shall tender its
 5 reasonable value." 15 U.S.C. § 1635(b). "By far, the majority of
 6 Courts to address the issue recently have required that borrowers
 7 allege an ability to tender the principal balance of the subject
 8 loan in order to state a claim for rescission under TILA." Garcia
 9 v. Wachovia Mortgage Corp., 2009 WL 3837621 at *3 (C.D. Cal.
 10 October 14, 2009) (collecting recent decisions from district courts
 11 within the Ninth Circuit).

12 The Court agrees with the "developing majority position" as
 13 articulated in Garcia. Id. at *4. Accordingly, Plaintiff must
 14 allege ability to tender in order to state a claim for TILA
 15 rescission. Because she has not done so, the Court grants
 16 Defendants' motion with respect to Plaintiff's rescission claim.

17 **C. Third Claim Under Fed. R. Civ. P. 17(a)(1) Fails**

18 Plaintiff's third cause of action states that it is for
 19 "Failure to Be the Real Party in Interest in a Foreclosure Action"
 20 under Federal Rule of Civil Procedure 17(a)(1). This claim is not
 21 cognizable. California law permits non-judicial foreclosures, and
 22 the Federal Rules of Civil Procedure are merely procedural and do
 23 not set forth any substantive rights with respect to foreclosures.
 24 This claim is therefore dismissed with prejudice.

25 **D. Fourth Claim Regarding "Original Note" Fails**

26 Plaintiff's fourth cause of action alleges that Defendants
 27 must provide evidence "of an original note, original mortgage and .
 28 . . show that they are indeed the holder [sic] in due course," and

1 that their failure to do so means "they are not authorized by law
 2 to proceed in a foreclosure action." (Compl. ¶ 20.) However,
 3 under California law, production of the original note is not
 4 required to initiate a non-judicial foreclosure. See Cal. Civ.
 5 Code § 2924(a); see also Farmer v. Countrywide Home Loans, Inc.,
 6 2008 WL 189025, at *2 (S.D. Cal. Jan. 29, 2009) (holding there is
 7 "no requirement under California law that the original note be
 8 produced in order to render the foreclosure proceedings valid").
 9 Therefore, Plaintiff's fourth claim is dismissed with prejudice.

10 **E. Fifth Claim for "Illegal Securitization" Fails**

11 Plaintiff asserts that "securitization is illegal," and that
 12 it violates "RICO, usury, and antitrust laws." (Compl. ¶ 21.)
 13 These "'conclusory allegations of law and unwarranted inferences'"
 14 do not support a claim for relief. Vazquez v. Los Angeles County,
 15 487 F.3d 1246, 1249 (9th Cir. 2007) (quoting Schmier v. U.S. Ct. of
 16 Appeals for the Ninth Cir., 279 F.3d 817, 820 (9th Cir. 2002)).
 17 The Court therefore dismisses this claim with prejudice.

18 **F. Sixth Claim for "Ultra Vires" and Fraud Fails**

19 Plaintiff alleges that a contract beyond a corporate charter
 20 is void. (Compl. ¶ 22.) She baldly asserts that Defendants
 21 engaged in fraud. (Id. ¶ 25.) First, it is unclear how the
 22 corporate "ultra vires" doctrine has any relevance to this case.
 23 Second, to the extent this claim can be read as one for fraud, that
 24 claim is time-barred. Cal. Code Civ. Proc. § 338(d) (setting forth
 25 three-year statute of limitations for fraud actions). The Court
 26 therefore dismisses this claim with prejudice.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS Defendants'
3 motion. All of Plaintiff's claims are dismissed with prejudice,
4 with the exception of her TILA and RESPA claims, which are
5 dismissed with leave to amend.

6 Plaintiff may amend her Complaint to attempt to cure the
7 deficiencies in her TILA and RESPA claims, namely (1) she may
8 attempt to plead facts demonstrating a basis for equitable tolling
9 or equitable estoppel for her TILA damages claim; (2) she may
10 attempt to plead facts showing ability to tender with respect to
11 her TILA rescission claim; (3) she may attempt to plead specific
12 facts demonstrating how Defendants allegedly have violated RESPA.
13 Plaintiff's amended complaint must be filed within twenty one (21)
14 days of the date of this Order. Failure to file an amended
15 complaint before this deadline shall be deemed consent to dismissal
16 with prejudice.

17 IT IS SO ORDERED.

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20 Dated: June 7, 2010


21 DEAN D. PREGERSON
United States District Judge

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